FILE COPY

No. 616

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

McALLISTER LIGHTERAGE LINE, INC., APPELLANT

against

UNITED STATES OF AMERICA,

and

INTERSTATE COMMERCE COMMISSION,

APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

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OPINION BELOW

The opinion of the specially constituted three-judge District Court for the Southern District of New York on final hearing (R. 36-43) is not reported.

JURISDICTION

The final judgment of the District Court was entered on August 9, 1945 (R. 43-44). The petition for appeal

(R. 44) was allowed on October 8, 1945 (R. 45). This Court noted probable jurisdiction on December 10, 1945 (R. 263). The jurisdiction of this Court is invoked under Section 210 of the Judicial Code (38 Stat. 220; 28 U. S. C., Section 47(a)) and Section 238 of the Judicial Code (43 Stat. 938; 28 U. S. C., Section 345).[1]

STATUTE INVOLVED

The relevant portion of Section 309(a) of Part III of the Interstate Commerce Act (54 Stat. 941(a); 49 U. S. C. 909(a) is set forth in the appendix, *infra*, page 25.

QUESTIONS PRESENTED

Appellant, a common carrier by water, sought "grandfather" rights in regard to Atlantic coastwise and tributary, inland routes upon proof that it was in bona fide operation over those routes on and subsequent to January 1, 1940, the "grandfather" date, except for (a) an interruption of service from 1933 through 1939 caused by the general economic depression, and (b) a further interruption from 1940 onward caused by the diversion of its vessels to essential war work within New York Harbor—transportation exempt

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[1] On the basis of these statutory provisions, this Court entertained direct appeals to review final judgments of specially constituted three-judge district courts in *Cornell Steamboat Co.* v. *United States*, 321 U. S. 634; *Alton R. Co.* v. *United States*, 315 U. S. 15, and *Barrett Line, Inc.* v. *United States*, Law ed. Advance Opinions, Vol. 89—No. 17, p. 1405.

from regulation under Part III of the Interstate Commerce Act. The questions presented are:

1. Whether the interruption in appellant's service from 1933 through 1939 caused by the general economic depression was beyond appellant's control, within the intendment of the proviso in the "grandfather" clause.

2. Whether the proceeding should be remanded to the Interstate Commerce Commission because of the Commission's failure to make findings as to the cause for the interruption in appellant's service from 1933 through 1939.

3. Whether, in the circumstances revealed by the record, the diversion of appellant's vessels to essential war work in New York Harbor from 1940 onward was an interruption of service over which appellant had control, within the intendment of the proviso in the "grandfather" clause.

4. Whether the proceeding should be remanded to the Interstate Commerce Commission for findings as to whether the interruption of service mentioned in the preceding question was beyond appellant's control, within the meaning of the "grandfather" clause proviso.

STATEMENT

This is an appeal from a judgment of a District Court, three judges sitting, convoked under the Urgent Deficiencies Act [(October 22, 1913) 38 Stat. 208, 220, c. 32, 28 U. S. C. A. Sec. 47, 7 F. C. A., Title 28, Sec. 47],

dismissing the petition of McAllister Lighterage Line, Inc., the appellant herein, to set aside an order of the Interstate Commerce Commission.

The Commission's order denied appellant's application for a certificate to engage in transportation of general commodities by water as a common carrier. The application was predicated on Section 309(a), the so-called "grandfather" clause, of Part III of the Interstate Commerce Act [54 Stat. 941; 49 U. S. C. A., 909(a); 10A. F. C. A., tit. 49, Sec. 909(a)]. The authority sought was to continue a transportation service by tug and barge which appellant had performed over routes along the Atlantic seaboard and tributary, inland waterways.[2]

The burden rested upon appellant of demonstrating that it or its predecessor in interest "was in bona fide operation as a common carrier by water on January 1, 1940 * * *-and [that appellant] * * * has so operated since that time * * * except * * * as to interruptions of service over which the applicant or its predecessor in interest had no control" [Sec. 309(a) of Part III of the Interstate Commerce Act]. To sustain its burden, appellant adduced evidence, in no way contro-

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[2] No question of procedure is presented on this appeal. The order, sustained by the court below, followed the usual proceedings before the Interstate Commerce Commission, including a hearing before an Examiner, an Examiner's report, exceptions to that report, the Report and Order of Division 4 of the Commission which denied the application, and an Order of the full Commission which denied appellant's petition for reconsideration (R. 53-261).

verted, before the Commission which revealed that until 1933 it had performed a freighting service by tug and barge adequate to entitle it to a common carrier certificate if such service had continued to January 1, 1940, the "grandfather" date, and uninterruptedly thereafter. The evidence relating to this service is hereinafter set forth, pages 12-13 *infra*. Appellant conceded before the Commission that from 1933 through 1939 its freighting operations had virtually ceased, but contended that it had bent every effort during those years to obtain traffic and that the paucity of its operations resulted solely from the severe economic depression which prevailed during that period; hence, appellant contended that the interruption in its service prior to January 1, 1940, was beyond its control, within the meaning of the proviso in the "grandfather" clause of the Act. Appellant substantiated this contention by uncontradicted and in part disinterested testimony (R. 141-144; 156-157, 158) but, as we hereinafter point out, pages 15-16 *infra*, the Commission omitted findings on this critical aspect of the case, even though appellant called the omission to the Commission's attention in its petition for reconsideration (R. 253-254, 256-258).

By 1940 the stagnant business conditions which had prevailed during the depression years gave way to the acute demand for shipping created by World War II (R. 155-156). In response to this demand, appellant, as the Commission found (R. 21), dedicated its fleet to "the performance in New York Harbor of lighterage and other work essential to the war effort." Appellant contended before the Commission, as the Commission's

decision makes clear (R. 21), that the employment of its vessels since 1940 in essential war work was not an interruption in service such as to work a forfeiture of its "grandfather" rights, and argued before the Commission that if its response to war traffic demands could be considered an interruption in service that such interruption was beyond appellant's control when viewed in the setting of the Government's war controls of shipping. The Commission's only reference to these contentions, in spite of its explicit fact finding that appellant had dedicated its fleet to essential war work since 1940, was the statement that appellant was not "holding itself out at the present time to perform" the service in respect of which it was seeking "grandfather" rights, and that appellant had "considerable facilities available at the present time, the use of which it voluntary has confined to exempt transportation within the limits of New York Harbor" (R. 21).

The court below recognized the merit in appellant's contention that the Commission had omitted findings concerning the reasons for the paucity in appellant's operations during the depression years. The court below stated in this regard:

> "It is true that the Commission did not make a definite finding that the interruption in service before January 1, 1940, either was or was not beyond the control of petitioner and its predecessors and if decision were wholly dependent upon the fact as to that matter the petitioner would have substantial ground for insisting that the cause be remanded to the Commission for a finding on that point" (R. 41).

The court below sustained the Commission's order, however, saying:

> "Decision, however, does not depend entirely upon what the petitioner or its predecessors did or failed to do on or before January 1, 1940. The statute requires as a condition precedent to the granting of a 'grandfather' certificate, where proof is not made of bona fide operation on January 1, 1940, and since that date, a showing that the interruption of service on and after the critical date was for causes not within the control of the petitioner or its predecessors. There was no proof whatever of subsequent operation and the Commission found both that the applicant 'is not holding itself out at the present time to perform such transportation' and that it 'has considerable facilities available at the present time, the use of which it voluntarily has confined to exempt transportation within the limits of New York Harbor.' This makes unimportant any deficiency in the findings as to the interruption of service before January 1, 1940. We think the Commission's findings above quoted necessarily imply that the petitioner's failure to resume the interrupted service after January 1, 1940, was not due to causes beyond its control" (R. 42).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In not holding that, within the intendment of Section 309(a) of the Interstate Commerce Act, ap-

pellant was in bona fide operation as a common carrier by water on January 1, 1940, and continuously thereafter, except as to interruptions of service over which appellant and its predecessors in interest had no control.

2. In not holding that in the circumstances revealed by the record the paucity of appellant's operations during the depression period from 1933 through 1939 did not constitute an abandonment of the service on which appellant predicates its "grandfather" rights under Section 309(a) of the Interstate Commerce Act.

3. In not remanding the proceeding to the Interstate Commerce Commission for appropriate findings as to the cause of the paucity in appellant's operations during the depression period from 1933 through 1939, and as to whether such cause constituted an interruption in service over which appellant and its predecessors in interest had control within the meaning of Section 309(a) of the Interstate Commerce Act.

4. In not holding that the paucity of appellant's operations during the period from 1933 through 1939 was an interruption in service beyond appellant's control within the meaning of Section 309(a) of the Interstate Commerce Act.

5. In holding that appellant's action in confining its service to essential war work within New York Harbor, effective at the time of the hearing before the Commission, constitutes an interruption in service over which appellant had control, within the meaning of Section 309(a) of the Interstate Commerce Act.

6. In holding that the dedication by appellant of its fleet to the performance of essential war work within the limits of New York Harbor was "voluntary," that is, within appellant's control.

7. In failing to remand the proceeding to the Interstate Commerce Commission for the purpose of having the Commission make explicit findings as to whether the dedication by appellant of its fleet to essential war work within New York Harbor, constituted an interruption in service within appellant's control.

8. In dismissing appellant's petition to set aside the Interstate Commerce Commission's orders.

SUMMARY OF ARGUMENT

Section 309(a) of Part III of the Interstate Commerce Act, herein called the "grandfather" clause, directs the Interstate Commerce Commission to grant a certificate to a common carrier by water without requiring proof of public convenience and necessity if the carrier "was in bona fide operation * * * on January 1, 1940, * * * and has so operated since that time * * * except * * * as to interruptions of service over which the applicant or its predecessor in interest had no control."

Appellant or its predecessors have been engaged in marine transportation since 1864; the business has been conducted continuously by its founder and his descendants through four generations; its activities have been extensive, varied, and at one time worldwide. Prior to 1933, appellant conducted a substantial freighting service as a common carrier by tug and

barge along the Atlantic coast and inland, tributary waters. From 1933 through 1939, the economic depression forced appellant to lay up almost its entire fleet of more than 100 vessels because of a dearth of traffic. From 1940 onward, appellant's fleet has been confined to essential war work in the New York Harbor area.

Without discussing appellant's contentions concerning the causes for the interruptions in its service, the Commission denied the application. The court below, conceding the deficiency in the findings as to the interruption before 1940, sustained the denial of the application because it held that the Commission had found by implication that the dedication of appellant's fleet to essential war work since 1940 was an interruption over which appellant had control.

The evidence before the Commission required a finding that the interruption of service before 1940 was caused entirely by the economic depression. Such an interruption is plainly beyond a carrier's control. Many decisions of the Commission have recognized that the controlling question under the statute is whether or not the carrier was itself responsible for the cessation in service. The proceeding should be remanded for appropriate findings on this aspect of the case.

In other cases, the Commission properly construed the "grandfather" clause by holding that, in the interest of national defense, an interruption of service caused by diversion of a carrier's fleet to war work does not work a forfeiture of "grandfather" rights.

The Commission's findings that since January 1, 1940, appellant has employed its vessels in "lighterage and other work essential to the war effort" (R. 21) entitled appellant to an ultimate finding that the change to war work since 1940 was not an interruption of service, within the meaning of the Act. Moreover, the Government's war time controls over shipping had, as the record shows, confined barge movements along the Atlantic coast almost entirely to the transportation of coal. Had appellant attempted to divert its fleet from New York Harbor where the national interest required its intensive utilization, the Government would unquestionably have requisitioned appellant's vessels. Hence, the diversion of appellant's fleet to war work was not within its control, and the Commission should have so found. Finally, the court below invaded the administrative province by holding that implicit in the Commission's subsidiary findings was a basic finding that the diversion to war work was an interruption within appellant's control.

ARGUMENT

Point I

APPELLANT WAS IN BONA FIDE OPERATION AS A COMMON CARRIER BY WATER OVER THE ROUTES AS TO WHICH IT APPLIED FOR OPERATING AUTHORITY ON JANUARY 1, 1940, AND CONTINUOUSLY SINCE, EXCEPT FOR INTERRUPTIONS IN SERVICE BEYOND ITS CONTROL

Appellant or its predecessors (hereinafter at times referred to jointly as "appellant") have been engaged in marine transportation since 1864; the business has been continuously owned by its founder or his descen-

dants through four generations (R. 20; 147-148).[3] In the past, appellant's business activities have been varied, extensive, and at one time were worldwide (R. 20; 152-153). At the time of the hearing before the Commission, appellant either owned or had under charter 101 units of floating equipment (R. 20; 148-149; Exhibit 6, R. 197-201).

In part substantiation of its position that it was in bona fide operation on and subsequent to January 1, 1940, the "grandfather" date, but for interruptions beyond its control, as a common carrier by water over routes along the Atlantic seaboard and inland, tributary waters, appellant put in evidence Exhibit 12 (R. 209-214). This Exhibit sets forth in detail the freighting operations which appellant performed from January 1, 1931, through December 31, 1932, as well as subsequently. As a point of departure for the argument that follows, we summarize the contents of Exhibit 12 for the two-year period just mentioned.

Freighting Operations by Tug and Barge

From January 1, 1931, through December 31, 1932, appellant transported by tug and barge a wide variety of commodities. It carried boilers, oil in cans and cases, machinery, paper in bales, sugar in bags, Hessian-cloth rags in bales, a clam shell bucket, lumber, kerosene in cases, assorted freight such as coffee and pepper in bags, prassava, construction fill, palm oil in cans and

[3] References preceding semicolons are to the Commission's findings; succeeding references are to the evidence.

cases, paraffin wax in bags and cases, germ copal, goat and sheep skins in bales, grape seed oil in cans, pyretheum flowers in barrels, and porcelain in crates.

Between January 1, 1931, and December 31, 1932, petitioner served the following ports:

NEW YORK STATE

New Rochelle, Davids' Island, Brooklyn, Roslyn, L. I., Long Island City and Staten Island.

NEW JERSEY

Paulsboro, Greenville, Delair, Point Breeze, Hoboken, Bayonne, Constable Hook, New Brunswick, Brown Hook, Princeton, Trenton, Bordentown, Jersey City and Weehawken.

PENNSYLVANIA

Philadelphia and South Philadelphia.

MARYLAND

Baltimore.[4]

From 1933 through 1939, with the exception of 1937, in which year appellant transported machinery, airplanes, guns and parts over portions of its routes, appellant's freighting operations were confined, as the Commission found, "primarily to the New York Harbor

[4] The Commission's findings do not fully describe appellant's freighting operations through 1932. A detailed discussion of appellant's freighting service through 1932 is unnecessary, however, since the Commission's decision does not question the adequacy of appellant's freighting service through 1932.

area" (R. 20-21; Exhibit 12). Appellant contended before the Commission that the paucity of its freighting operations from 1933 through 1939 was the result of circumstances beyond its control. In proof of this contention, appellant introduced evidence, in no way challenged, which was in part given by a disinterested witness of recognized standing as an expert in marine transportation (R. 141-142), that the general economic depression during the years 1933 through 1939 had so severe an impact upon shipping in the coastwise region serviced by appellant as to compel every carrier having a substantial fleet to lay up large numbers of its vessels for want of traffic (R. 143-144; 156-158). Appellant's vice president (R. 145) testified that in those years the economic depression deprived appellant of traffic to such an extent that at one point it was forced to lay up all but one tug and a few barges of its fleet of over a hundred vessels (R. 156). The Commission's Examiners found that appellant's operations were reduced at times because of the depression "to one or two tugs and a few inland scows and lighters" (R. 228). The Commission made no findings whatever on this aspect of the case, contenting itself with a mere recital of appellant's contention (R. 21).

A. *The paucity of Appellant's Operations From 1933 Through 1939 Resulted From a General Economic Depression Beyond Appellant's Control; Hence the Interruption in Service During the Depression Did Not Work a Forfeiture of Appellant's "Grandfather" Rights*

The Commission, without discussing the reason for appellant's reduced operations during the depression period, dismissed appellant's contention by saying: "Obviously, the remote operations heretofore described do not establish bona fide operations on January 1, 1940, and since" (R. 21).

Because of the Commission's silence, one cannot say from reading its decision whether or not it is in accord with its Examiners' finding that the interruption in appellant's service during the years 1933 through 1939 resulted from the economic depression. Nor can one tell whether the Commission regards an interruption from such cause as beyond a carrier's control, within the intendment of the proviso to Section 309(a) of the Act. In view of the evidence previously mentioned and of appellant's clearly presented contention, the Commission was plainly obligated to make appropriate findings on this aspect of the case. As this Court has observed: "The administrative process will best be vindicated by clarity in its exercise." *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 197.[5] The court

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[5] Cf. *Eastern-Central Motor Carriers Association* v. *United States*, 321 U. S. 194, 211-212; *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, 489; *Howard Hall Co., Inc.* v. *United States*, 315 U. S. 495, 499; *United States* v. *B. & O. R. R. Co.*, 293 U. S. 454, 464.

below, as has been stated, page 6, *supra*, acknowledged the inadequacy of the Commission's findings on the cause for the interruption in service from 1933 through 1939. Manifestly, the proceeding should be remanded to the Commission for clarifying findings. The facts on which appellant's contention in regard to the interruption of service from 1933 to 1940 rest are clearly borne out by the evidence previously mentioned, by the Examiners' findings quoted above, and by the logic of the situation. From 1933 to 1940, appellant had a large fleet representing a tremendous investment. To indulge in the assumption that the Commission's silence is tantamount to a reversal of its Examiners' findings as to the severity of the impact upon appellant's business of the depression, is to affirm the extravagant notion that appellant deliberately kept the major part of its vessels idle over a period of years when employment for them was available.

If the facts are found in favor of appellant's contentions, the sole question that remains is whether the interruption was beyond appellant's control within the meaning of the Act. The answer to that question must be in the affirmative. For, the Commission's own decisions on "grandfather" applications recognize that an interruption of service stemming from a lack of traffic is beyond a carrier's control within the intendment of the Act. See *Carpenter*, 32 M. C. C. 580, 582; *Larson*, 20 M. C. C. 644; *Johnson*, 10 M. C. C. 495; *Perkins*, 10 M. C. C. 507; *Brown & McCooey, Inc.*, 18 M. C. C. 503, 505; *L. & L. Freight Lines, Inc.*, 2 M. C. C. 9, 10; *Kelly*, 18 M. C. C. 706; *Fitzgerald's Exp.*, 6 M. C. C. 499, 500;

Barnes Truck Co., Inc., 24 M. C. C. 465, 467; *Hunter Motor Freight, Inc*, 27 M. C. C. 51, 53, 54.

A clear application of the Commission's interpretation of the proviso in the "grandfather" clause is found in the *Carpenter* decision, the relevant portion of which is set out in the margin.[6]

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[6] "Some time during 1937 the shipper for whom applicant had been transporting beer from Newark lost the agency. The brewery which previously had been the source of supply opened its own distribution agency at Providence, and has since transported its products to Providence in its own vehicles. While no specific date is indicated as to when the transportation from New York and West Haven was discontinued, it is admitted that no transportation has been performed from these points since 1937. Applicant has solicited shippers at various times, but without success. He contends that the cessation is one over which he has no control, and that he is ready and willing to resume this operation if and when he is able to obtain the traffic. The sole question here is whether applicant's present situation is the result of some act or omission within his control. Certainly he cannot be held responsible for the change by the shipper in the method and place of its distribution of these malt beverages. Likewise, the theory of cessation of operations within applicant's control cannot, in this case, be supported by the fact that applicant failed to obtain any traffic since this change in 1937. Nothing that applicant has done suggests, even remotely, that there was any desire or intention to abandon service. On the contrary, his acts show beyond doubt that he held himself ready, able and willing to conduct transportation and we think were sufficient, in these circumstances, to satisfy the continuity of service requirements of the statute. To hold otherwise would result in situations, in cases like this, where through no fault of its own a carrier may be left with its investment, but with no possibility of putting it to use should the traffic return or new similar traffic develop. We conclude that applicant is entitled to 'grandfather' authority, which would permit continuing the operations in question." *Carpenter*, 32 M. C. C. 580.

In the court below, counsel for the Government argued that an interruption of service caused by economic depression is not beyond the control of a carrier, within the meaning of the proviso in the "grandfather" clause. In support of this argument, the Government relied upon the *Gregg Cartage* case (316 U. S. 74), in which this Court held that bankruptcy of the carrier was not, under the circumstances revealed by the record, a cause beyond the carrier's control. But the holding in the *Gregg Cartage* case must be read in the light of the fact that the carrier resorted to a "friendly receivership in the state court" (316 U. S. at 79) which "precipitated the involuntary bankruptcy in the Federal court, which in turn brought operations to a halt" (*id.*). Thus, the cessation was due to voluntary action of the carrier in arranging for a "friendly receivership" in the state court.[7]

B. *The Commission's Conclusion, Sustained by the Court Below, That Appellant Is Not Holding Itself Out At the Present Time to Perform the Service for which It Seeks "Grandfather"*

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[7] The Court emphasized this when it pointed out (316 U. S. at 81):

> "When it found itself unable to meet its obligations, Gregg arranged a receivership in the state court, securing the appointment of its own counsel as receiver. Only the one creditor which filed the bill appears to have been consulted. Thus, the petitioner not only arranged deliberately to commit an act of bankruptcy but it managed the affair in a manner not unlikely to provoke the unconsulted creditors to file a petition in bankruptcy. * * *."

Rights Because, Assertedly, It Has "Voluntarily" Confined Itself to Exempt Transportation Within New York Harbor Proceeds On A Mistaken Interpretation of the Act, in View of the Commission's Finding That "Since January 1, 1940, Applicant's Fleet Has Been Engaged Almost Exclusively Within New York Harbor in the Performance of Lighterage and Other Work, Essential to the War Effort" (R. 21)

The fallacy that inheres in the conclusion that appellant should forfeit its "grandfather" rights because it placed its facilities in essential war work exempt from regulation under the Act is apparent from the Commission's own decisions which recognize that the dedication of a carrier's fleet to essential war work should, "in the interest of national defense" (*American-Hawaiian S.S. Co.*, 250 I. C. C. 219, 222), be regarded as an interruption in service beyond the carrier's control within the meaning of the proviso in the "grandfather" clause of the Act. In the *American-Hawaiian* case, the carrier had, at the request of the Maritime Commission, withdrawn its vessels from serving 36 ports as to which it claimed "grandfather" rights, in order to place them in a service essential to national defense.[8]

Here, appellant did not wait for a request but placed its entire fleet in a critical sphere of wartime shipping, namely the lighterage of war cargoes and the docking

[8] See, also, *United States Lines*, 250 I. C. C. 229, 233; and *Sudden & Christenson*, 250 I. C. C. 419, 422.

and undocking of steamers in the Port of New York. If the *American-Hawaiian* decision is to be distinguished, the distinction can be made only on the ground that there the Maritime Commission requested the change in the carrier's service. Unless, however, judicial notice is taken of the Government's power to enforce such a "request" by requisition of the carrier's vessels the carrier's compliance with the request must be viewed as voluntary. But if judicial notice of the Government's requisition power may properly be taken (see Section 902 of the Merchant Marine Act of 1936, as amended), then the *American-Hawaiian* case is indistinguishable in principle from the present case.

In order to understand the reasons which impelled the Commission to hold that a diversion of a carrier's vessels to war work is not an interruption of service within the carrier's control, one must have in mind the profound changes in domestic water-borne traffic which the War brought about. The instant application concerns a tug and barge freighting service along a coastwise route. The Commission in *Administrator, WSA, Temporary Authority Application (Coastwise and Intercoastal); No. W-926*, 5 Federal Carriers Cases, par. 31,001, pointed out that there was a "withdrawal of most coastwise and intercoastal water service" during the War. In order to assure the most effective utilization of the shipping of the United States for the successful prosecution of the War, the Government exerted control over all domestic shipping (R. 123). The Office of Defense Transportation, for example, by virtue of its powers under Presidential Executive

Order No. 8989, confined barge movements along the Atlantic coast almost exclusively to the movement of coal (R. 174-175). It is common knowledge, moreover, that the flow of traffic in and out of New York Harbor swelled to gigantic proportions during the War, a condition which necessitated intensive utilization of every available tug, barge, lighter, and scow in the movement of war cargoes. Had appellant attempted to utilize a substantial portion of its fleet in its freighting service along the Atlantic coast, there is not the slightest doubt that the Office of Defense Transportation would have frustrated such attempt, and if necessary, would have requested the War Shipping Administration to requisition appellant's vessels. The court below dismissed this argument by stating that whether or not such an attempt would have been prevented by the Government lay "in the realm of pure speculation" (R. 42).

Appraising appellant's contention thus lightly, the court below, in the guise of interpreting the Commission's subsidiary findings, itself supplied a basic finding which the Commission had failed to make. The Commission, as has been noted, did not discuss appellant's contention that the dedication of its fleet since 1940 to essential war work in New York Harbor was not an interruption of service such as to forfeit "grandfather" rights. The Commission found that appellant was not "holding itself out" at the time of the hearing to perform the service in respect of which it sought a "grandfather" certificate and that appellant had considerable facilities "the use of which it

voluntarily has confined to exempt transportation within the limits of New York Harbor" (R. 21). In sole reliance upon these subsidiary findings, the court below declared: "We think the Commission's findings above quoted necessarily imply that the petitioner's failure to resume the interrupted service after January 1, 1940, was not due to causes beyond its control" (R. 42). The Court's action in this respect disregards, we believe, the settled rule that a reviewing court should not supply basic findings by inference or implication. *Wichita R. & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, 58-59; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 433; *Atchison, Topeka & Santa Fe R. Co.* v. *United States*, 295 U. S. 193, 201-202. In the *Atchison* case, this Court declared that it would "not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order."

In the present case it is doubtful whether the Commission would have made the basic finding that the court supplied. The doubt on this score arises from the fact that the Commission has repeatedly, and so far as we know, consistently held that a carrier does not forfeit its "grandfather" rights by diverting its vessels to war service (*supra*, p. 19). As the Commission's decision in the *American Hawaiian* case, page 19, *supra*, makes clear, the Commission did not think that Congress intended to deprive a carrier of

"grandfather" rights if the carrier diverted his fleet to essential war work. Such a diversion is necessarily temporary, since it must end with the war. Moreover, it is unthinkable that Congress should have intended a forfeiture of valuable rights as the consequence of action designed to implement successful prosecution of the war.

By omitting to answer appellant's contention, the Commission has avoided its responsibility of clearly indicating the reasons for denying the application. The limited scope of judicial review in a case like this argues strongly for a reviewing court's insisting that the administrative body "disclose the basis of its order" by adequate findings. *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. at 197. In the light of the foregoing, the instant case is an apt illustration of the wisdom of the rule that bars a reviewing court from supplying basic administrative findings by inference or implication.

Appellant has operated and now operates over 100 vessels of all descriptions, capable of serving both on the high seas and on inland waterways. It is a family corporation the founder of which goes back four generations, and whose investment, as of July 31, 1943, was over a million dollars (R. 223). To deny such a carrier a certificate is not consistent with the public policy declared in the Act and destroys its postwar competitive position, achieved over many years.

In *U. S.* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, the Court had before it a "grandfather"

case under the Motor Carrier Act (Part II of the Interstate Commerce Act). The Court said:

> "This Act should be liberally construed to preserve the position which those like (applicant) have struggled to obtain in our national transportation system."

And Mr. Justice DOUGLAS observed in the *Gregg Cartage* case (316 U. S. 74, 87):

> "Congress has provided that those who obtained a position in the competitive transportation system should be allowed to retain the fruits of their struggle. * * * We should not permit those statutory grants to be whittled away on the basis of technical and legalistic grounds which find no expression in the statute however much the administrative chore may be alleviated."

CONCLUSION

The judgment under review should be reversed and the proceeding remanded to the Commission with directions to grant an appropriate certificate or to clarify its findings so as to indicate the basis for denying the application.

Respectfully submitted,

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APPENDIX

The relevant portion of the Interstate Commerce Act (Section 309(a)) is as follows:

> Except as otherwise provided in this section and Section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: *Provided, however*, that, subject to section 310, *if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940*, over the route or routes or between the ports with respect to which application is made and *has so operated since that time* (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) *except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control*, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section, and prior to the expiration of one hundred and twenty days after this section takes effect; (emphasis supplied).